

JUDGE SULLIVAN

13 CV 2179 (RJS)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and JULIA  
PRESTON,

Plaintiffs,

- against -

UNITED STATES DEPARTMENT OF  
JUSTICE,

Defendant.

X

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X

**COMPLAINT**

APR 02 2013

**ECF CASE**

U.S.D.C. S.D. N.Y.  
CLERKERS

Plaintiffs The New York Times Company and Julia Preston, by their undersigned attorneys, allege for their Complaint:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), 28 U.S.C. § 2201 and § 2202, the United States Constitution, and federal common law seeking the production of agency records improperly withheld by Defendant in response to requests properly made by Plaintiffs.

2. The Executive Office for Immigration Review ("EOIR") is a component of Defendant United States Department of Justice ("DOJ").

3. DOJ, through EOIR, has denied Plaintiffs full access to two decisions by Immigration Judge James Grim. Specifically, DOJ has declined to provide two written decisions (the "Decisions") regarding the removal of General Carlos Eugenio Vides Casanova, a former El Salvadorian official who was implicated in human right violations.

4. The withholding of the Decisions violates FOIA and is contrary to Plaintiffs' rights of access under the First Amendment and common law.

### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

6. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

7. Plaintiff The New York Times Company operates The New York Times newspaper ("The Times"). The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, N.Y.

8. Plaintiff Julia Preston is a reporter for The Times.

9. Defendant DOJ is an agency of the federal government that has possession and control of the records that Plaintiffs seek.

### **FACTS**

#### ***The Immigration Court System***

10. DOJ, through EOIR, oversees the entire United States immigration court system. As such, it is responsible for deciding whether individuals charged with violating United States immigration laws should be removed from the United States, or whether those individuals should be afforded some form of relief or protected status and allowed to remain within the

country. In overseeing this vast system, DOJ relies on over 260 immigration judges in 59 immigration courts across the country.

11. In Fiscal Year 2012 alone, more than 400,000 immigration-related matters were received in the immigration court system, and some 380,000 matters were completed during that same period. Of the matters received, more than 300,000 were immigration court proceedings – which include some matters related to the exclusion, removal, and/or relief from removal of aliens. The rest of the proceedings were bond redetermination hearings or motions to reopen and reconsider a previously heard matter.

12. In an immigration court removal proceeding, the respondent-alien first appears before an immigration judge and either contests or admits the charges against him or her. This process usually occurs at a master calendar hearing. If the charges are contested or the respondent represents that he or she may request relief from removal, the judge is empowered to grant an adjournment to allow the respondent to prepare for a full evidentiary immigration court hearing

13. Once the judge holds a removal hearing regarding either the removability of the respondent or his or her requests for relief from removal, the judge renders a decision. At this stage, the judge may find the respondent removable on the charged grounds.

14. Thereafter, the Immigration and Nationality Act (the “INA”) provides for a wide-range of forms of relief from removal, such as granting the respondent asylum, or ordering adjustment of status. If the respondent is not subject to removal as charged, then the immigration judge may terminate the proceedings.

15. In the course of the proceedings, the parties may move the court for certain types of relief, including a change of venue, a change of counsel, a stay of removal, or the



issuance of a subpoena. Immigration judges decide these motions either by written decision or orally at a hearing.

16. Immigration hearings are presumptively open to the public and may be closed only in certain limited situations set forth in the Immigration Court Practice Manual.

17. Out of the total number of completed court proceedings in FY 2012, approximately 187,000 were completed when the judge issued a decision in the case. Some 70 percent of those cases resulted in an order of removal; 13.3 percent were terminated; and 16.1 percent resulted in the grant of some form of relief.

***The Removal Proceedings of General Vides***

18. Carlos Eugenio Vides Casanova was El Salvador's Director of the National Guard, one of the three security forces under military control, from October 1979 to April 1983 and then was elevated to the Minister of Defense from 1983 to 1989.

19. General Vides has been accused of "ordering, inciting, assisting or otherwise participating" in the commission of acts of torture and extra-judicial killing during those time periods, pursuant to INA § 237(a)(4)(D).

20. General Vides was accused, among other things, of assisting or otherwise participating in the killing of a group of four American churchwomen and the assassinations of two American labor advisors.

21. Upon retiring in 1989, General Vides immigrated to the United States as a legal permanent resident. At the time of immigration, General Vides had close family members residing in the United States. General Vides had visited the United States and met with U.S. officials frequently during his tenure.

22. Since his immigration to the United States, two civil cases have been brought against General Vides for human rights violations, including assassination and torture. In 2002, a Florida jury found General Vides and General Jose Guillermo Garcia, another former Minister of Defense for El Salvador, civilly liable for the torture of three Salvadorans. In the other case in 2000, a jury did not find either General Vides or General Garcia liable for the deaths of the four American churchwomen.

23. On or about October 2, 2009, removal proceedings were initiated against General Vides.

24. Upon information and belief, in the course of the removal proceedings against General Vides, Immigration Judge Grim issued a written decision in February 2012 (the “February Decision”) concerning whether General Vides was subject to removal from the United States under INA § 237(a)(4)(D) because he had “committed, ordered, incited, assisted or otherwise participated” in certain human rights violations, to wit, torture or extra-judicial killing.

25. Upon information and belief, the Immigration Judge’s decision was an exhaustive examination of the testimonial and documentary evidence that had been presented in a public proceeding.

26. The Department of Homeland Security presented the testimony of two torture survivors, one former U.S. Ambassador to El Salvador, and one El Salvador academic expert and submitted thousands of pages of documents; the respondent presented the testimony of one former U.S. Ambassador to El Salvador and one former Deputy Chief of Mission for the U.S. Embassy and also testified on his own behalf.

27. Upon information and belief, Immigration Judge Grim’s decision was a detailed interpretation of the applicable – and relatively recent – section of removal law.

28. Upon information and belief, the decision is the most comprehensive legal assessment of General Vides's role in human rights abuses to date.

29. Upon information and belief, again as part of the removal proceedings against General Vides, Immigration Judge James Grim issued a second decision on or about August 15, 2012 (the "August Decision") concerning General Vides's requests for relief from removal.

30. Upon information and belief, Immigration Judge Grim denied all of General Vides's requests for relief from removal.

31. Upon information and belief, the August Decision incorporated the February Decision by reference and made minor corrections to the February Decision.

32. In opening the removal proceedings on April 18, 2011, Immigration Judge Grim made a ruling from the bench that the hearing would be open to the public.

33. As a result, members of the public attended the hearing, which lasted seven days,

34. The public was able to hear the parties present arguments on the very issues that the Decisions ultimately decided and to witness extensive testimonial and documentary evidence on the subject of General Vides's removability.

35. Upon information and belief, the Decisions offer significant and perhaps unprecedented interpretations of statutory language that may affect other eligibility proceedings.

#### ***The Times's Requests***

36. On or about September 28, 2012, The Times submitted a FOIA request to DOJ through EOIR (the "Request") seeking the August Decision and the February Decision.



37. On or about October 12, 2012, DOJ through EOIR denied The Times's request (the "Denial"). In reaching that decision, DOJ claimed that because the Decisions were "preliminary" and The Times was a "third-party requester" and had not obtained General Vides's authorization, The Times was not entitled to the two Decisions.

38. DOJ stated that it would "only [release] a redacted version of the final agency decision to avoid a clearly unwarranted invasion of privacy pursuant to 5 U.S.C. § 552(b)(6)." DOJ stated that at that time "EOIR still [had] no releaseable [sic] information to provide . . . because EOIR has not issued a final agency decision."

39. On or about November 7, 2012, The Times submitted an administrative appeal to DOJ's Office of Information Policy ("OIP") challenging the Denial. The Times noted that it knew of "no basis under FOIA for deferring a determination of whether a document in an agency's possession is disclosable." The Times stated that it knew of "nothing about the FOIA exemption determination that would turn on the absence or existence of a final decision" and that that therefore the Denial was improper.

40. On or about January 3, 2013, DOJ through OIP denied the administrative appeal, reasserting that the decisions were exempted from disclosure under 5 U.S.C. § 552(b)(6). Unlike in the Denial, DOJ did not make the same argument that the decisions were somehow not final.

41. On or about February 14, 2013, The Times submitted a letter to DOJ through EOIR stating that withholding the August Decision and the February Decision was contrary to the First Amendment and common law rights of access.

42. DOJ has not responded in any way to The Times's letter of February 14, 2013.

43. Plaintiffs had previously made a FOIA request for the February Decision and were informed by DOJ on or about March 15, 2012 that it had no releasable information because the matter was still pending. An administrative appeal of the determination on or about June 27, 2012 was deemed untimely by DOJ in a letter dated August 21, 2012.

***The Public's and The Times's Interest in Disclosure***

44. The public has a general interest in knowing how DOJ administers the immigration court system. The United States has a rich history of openness and access to adjudicatory proceedings. Such transparency ensures that the individual's and society's interests are being adequately represented and ensures the legitimacy of all adjudicative systems.

45. The immigration court system adjudicates the rights of hundreds of thousands of individuals each year. Although hearings are generally open to the public, many aspects of the immigration court process are withheld from public view – including, as here, certain written decisions that directly affect the rights of the parties.

46. These decisions may include novel and significant interpretations of law and applications of that law to the facts of the case.

47. The public has a particular interest in monitoring General Vides's case given his alleged history of participating in torture, extra-judicial killing, and other human rights violations, especially in light of his long-term stay in the United States despite these accusations. The public's interest is only heightened by the understanding that Immigration Judge Grim interpreted and applied a statute concerning human rights violators in a new way, a precedent that other immigration judges may follow.

48. Further, the public has a particular interest in Judge Grim's examination of the submitted evidence in a proceeding highly unusual for an immigration court in its length, type



and number of witnesses, and number of submitted documents. Finally, the public has a particular interest in the decisions which implicate the credibility of former U.S. officials.

49. Without prompt access to the Decisions, the public is unable to discern whether DOJ is performing its duties lawfully and adequately. In particular, it is impossible to tell how the judge balanced the various arguments made at the public hearings; how the judge interpreted the federal statutes at issue; how the judge applied those statutes to the facts of General Vides's case; and how General Vides's past conduct affected the judge's decisions.

### **FIRST CAUSE OF ACTION**

50. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

51. DOJ is an agency subject to FOIA, 5 U.S.C. § 552(f) and must therefore release in response to a FOIA request any records in its possession at the time of the request not subject to an exemption and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

52. DOJ has asserted no lawful basis under FOIA for withholding the August Decision and the February Decision.

53. DOJ's failure to provide this information violates FOIA generally, and specifically 5 U.S.C. § 552(a)(3).

54. Plaintiffs are entitled to an order compelling DOJ to produce the decisions.

### **SECOND CAUSE OF ACTION**

55. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

56. DOJ is an agency subject to the Constitution of the United States and the First Amendment, as well as federal common law.

57. Under both the First Amendment and the common law, Plaintiffs, as well as the public at large, have a right of access to decisions rendered in adjudicatory proceedings, whether those proceedings are conducted by the judiciary or by an administrative agency wielding quasi-judiciary power.

58. DOJ's failure to provide the August Decision and the February Decision violates the First Amendment and is contrary to the rights of the Plaintiffs under federal common law.

59. Plaintiffs are entitled to an order declaring that the Decisions are public under the First Amendment of the Constitution and that Plaintiffs have a right to copy and inspect the documents.


60. Plaintiffs are entitled to an order declaring that the Decisions are public under federal common law and that Plaintiffs have a right to copy and inspect the documents.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully requests that this Court:

- a. Declare that the withheld decisions concerning Carlos Eugenio Vides Casanova are public under 5 U.S.C. § 552 and the First Amendment and common law rights of access;
- b. Order DOJ to provide those records to Plaintiffs within 20 business days of the Court's order;
- c. Award Plaintiffs the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and
- d. Grant Plaintiffs such other and further relief as this Court deems just and proper.

Dated: New York, New York  
April 2, 2013



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